

OLL 84-3754
5 October 1984
File FOIA

MEMORANDUM FOR: See Distribution

FROM:

Deputy Chief, Legislation Division
Office of Legislative Liaison

RE:

FOIA

Attached for your information and use is a copy of H.R. 5164 as passed by both Houses of Congress and enrolled for transmittal to the President. OMB has requested our views on the enrolled bill, and I have also attached a copy of our views letter and our proposed Presidential signing statement. As far as we know, there will not be a Presidential signing ceremony. The enrolled bill has been received by the White House; however, we do not know exactly when the President will sign the bill. He has until 15 October to do so.

Attachments

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OLL/LEG/KAD:ngm [redacted] (5 Oct. 84)

Ninety-eighth Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Monday, the twenty-third day of January,
one thousand nine hundred and eighty-four*

An Act

To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Central Intelligence Agency Information Act".

SEC. 2. (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

"TITLE VII—PROTECTION OF OPERATIONAL FILES OF THE CENTRAL INTELLIGENCE AGENCY

"EXEMPTION OF CERTAIN OPERATIONAL FILES FROM SEARCH, REVIEW, PUBLICATION, OR DISCLOSURE

"SEC. 701. (a) Operational files of the Central Intelligence Agency may be exempted by the Director of Central Intelligence from the provisions of section 552 of title 5, United States Code (Freedom of Information Act), which require publication or disclosure, or search or review in connection therewith.

"(b) For the purposes of this title the term 'operational files' means—

"(1) files of the Directorate of Operations which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;

"(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

"(3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; except that files which are the sole repository of disseminated intelligence are not operational files.

"(c) Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning—

"(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5, United States Code (Freedom of Information Act), or section 552a of title 5, United States Code (Privacy Act of 1974);

"(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code (Freedom of Information Act); or

"(3) the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Over-

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sight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

"(d)(1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.

"(2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.

"(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

"(e) The provisions of subsection (a) of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of subsection (a), and which specifically cites and repeals or modifies its provisions.

"(f) Whenever any person who has requested agency records under section 552 of title 5, United States Code (Freedom of Information Act), alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that—

"(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations which is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court;

"(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

"(3) when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

"(4)(A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

"(B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written

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submission based on personal knowledge or otherwise admissible evidence;

"(5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;

"(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

"(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

"DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES

"Sec. 702. (a) Not less than once every ten years, the Director of Central Intelligence shall review the exemptions in force under subsection (a) of section 701 of this Act to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.

"(b) The review required by subsection (a) of this section shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.

"(c) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this section may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining (1) whether the Central Intelligence Agency has conducted the review required by subsection (a) of this section within ten years of enactment of this title or within ten years after the last review, and (2) whether the Central Intelligence Agency, in fact, considered the criteria set forth in subsection (b) of this section in conducting the required review."

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

"TITLE VII—PROTECTION OF OPERATIONAL FILES OF THE CENTRAL INTELLIGENCE AGENCY

"Sec. 701. Exemption of certain operational files from search, review, publication, or disclosure.

"Sec. 702. Decennial review of exempted operational files."

(c) Subsection (q) of section 552a of title 5, United States Code, is amended—

(1) by inserting "(1)" after "(q)"; and

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(2) by adding at the end thereof the following:

“(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.”.

SEC. 3. (a) The Director of Central Intelligence, in consultation with the Archivist of the United States, the Librarian of Congress, and appropriate representatives of the historical discipline selected by the Archivist, shall prepare and submit by June 1, 1985, a report on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency information of historical value.

(b)(1) The Director shall, once each six months, prepare and submit an unclassified report which includes—

(A) a description of the specific measures established by the Director to improve the processing of requests under section 552 of title 5, United States Code;

(B) the current budgetary and personnel allocations for such processing;

(C) the number of such requests (i) received and processed during the preceding six months, and (ii) pending at the time of submission of such report; and

(D) an estimate of the current average response time for completing the processing of such requests.

(2) The first report required by paragraph (1) shall be submitted by a date which is six months after the date of enactment of this Act. The requirements of such paragraph shall cease to apply after the submission of the fourth such report.

(c) Each of the reports required by subsections (a) and (b) shall be submitted to the Permanent Select Committee on Intelligence and the Committee on Government Operations of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate.

SEC. 4. The amendments made by subsections (a) and (b) of section 2 shall be effective upon enactment of this Act and shall apply with respect to any requests for records, whether or not such request was made prior to such enactment, and shall apply to all civil actions not commenced prior to February 7, 1984.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*



Washington, D.C. 20505

OLL 84-3736

0 3 OCT 1984

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This letter is in response to your request for the views of the Central Intelligence Agency (CIA) on enrolled bill H.R. 5164, the "Central Intelligence Agency Information Act". This legislation represents the culmination of several years of effort by the CIA to achieve meaningful relief from the unique burdens and serious problems posed to it by the Freedom of Information Act (FOIA).

H.R. 5164 adds a new title VII to the National Security Act of 1947 to allow the Director of Central Intelligence (DCI) to exempt operational files, as defined in the legislation, from the search, review, publication and disclosure requirements of the FOIA. All files of the CIA not falling within the definition of operational files will remain subject to the current requirements of the FOIA. Furthermore, the legislation provides for continued search and review of exempted operational files in response to FOIA requests in the following three areas:

- (1) requests from United States citizens or permanent resident aliens seeking information on themselves;
- (2) requests concerning any special activity where the existence of the activity is not exempt from disclosure under the FOIA; and
- (3) requests concerning the specific subject matter of an investigation conducted by those Congressional committees or Executive Branch agencies designated in the bill.

H.R. 5164 retains the de novo judicial review provided in the FOIA and specifies how the federal courts shall proceed in litigation filed against the CIA pursuant to this legislation. However, the provisions of the bill will not apply to any civil action filed prior to 7 February 1984. The courts are also given the authority to review whether the DCI has conducted the required decennial review of exempted operational files, consistent with the criteria set forth in the bill, to determine if any of the exemptions can be removed.

There will be close and continuing Congressional oversight of the implementation of this legislation. The bill requires the DCI to file four semi-annual unclassified reports with four designated Congressional committees describing the status of CIA processing of FOIA requests. A provision amending the Privacy Act will prohibit the CIA or any other agency from using the Privacy Act as an exemption (b)(3) withholding statute under the FOIA. The DCI is also required to submit a report by June 1985 on the feasibility of conducting systematic declassification review of CIA information of historical value for release to the public.

The CIA does not expect either an increase or decrease in its costs of processing FOIA requests. The Agency has committed itself to maintain its current resource allocation for FOIA processing for two fiscal years with the goal of substantially reducing, if not eliminating, its two to three year backlog.

Enactment of H.R. 5164 will mark the achievement of meaningful relief for the CIA and the successful attainment of yet another legislative goal of this Administration. It is therefore my pleasure to inform you that the Central Intelligence Agency strongly and wholeheartedly recommends the President approve this legislation and sign H.R. 5164 into law. We further recommend that the President make a statement upon signing H.R. 5164 and a proposed signing statement is enclosed for your consideration.

Sincerely, ~



/ John N. McMahon
Acting Director of Central Intelligence

Enclosure

Signing Statement for H.R. 5164

It is indeed a pleasure for me today to sign into law the "Central Intelligence Agency Information Act". The Act will provide the CIA with substantial relief from the unique problems posed by the requirements of the Freedom of Information Act to search and review operational files while at the same time ensuring continued access to information which is properly releasable to the public.

I want to take special note of the fact that this legislation is the result of a strong bipartisan effort by several members of both Houses of Congress. In this regard, I wish to thank Chairmen Goldwater and Boland of the Senate and House Intelligence Committees, respectively, for their outstanding leadership and commitment in securing passage of this bill. Enhancement of our intelligence capabilities is clearly an area of interest to us all where we can work together in the best interests of our national security.

It is with a special sense of pride and appreciation, then, that I now sign H.R. 5164 into law.